This is the case in the English and many of the American statutes against gaming and usury, and some others, at the present day: Story on Promissory Notes, §§ 191, 192, and notes.

The defect here seems to have been in the statute, which, of course, the courts could not supply. Very likely the statute could not have been obtained with the declaration that security given upon such consideration should be held void in all hands. For it must be confessed that there is great tenderness manifested towards that class of thieves and robbers, who name their ill-gotten gains by any species of speculation. There seems to be a kind of regret felt that such men should find their gains turning to ashes in their hands. Few men, comparatively, feel prepared to condemn the dealing in any speculative commodities and to stamp them with the brand of illegality. This may account for the defect in the statute. But the decision is most unquestionable.

Statutes similar to the one referred to in the principal case (which we take to be the parent of the absurd brood) have been passed recently in several of the states, and are beginning to produce their inevitable crop of litigation; but we believe the courts have uniformly given them the same construction—required alike by legal principles and common honesty—as in the foregoing opinion. See *Zimmerman* v. *Rote*, 75 Penna. St. 188; *Nebeker* v. *Cochran*, 14 Am. Law Reg. N. S. 697.

I. F. R.

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## *Supreme Court of the United States.*

### MARY R. KOHL ET AL. *v.* THE UNITED STATES.

The right of eminent domain is inherent in all governments by virtue of their sovereignty. For all purposes required by the constitution, this right exists in the United States independently of any consent of the state in which the property lies.

Such state can neither control the right nor prescribe the mode of its exercise. Its consent is necessary, if at all, only for the transfer of exclusive jurisdiction and right of legislation after the land has been acquired.

*Semble*, A state has no power to condemn and take lands for the use of the United States. The correct mode is a proceeding by the United States directly.

The word purchase is technically large enough to include an acquisition by taking under the right of eminent domain, but as used in statutes generally, it means only an acquisition by contract between the parties without governmental interference. In connection, however, with the words "at private sale or by condemnation," it includes the authority to take land by virtue of eminent domain.

A proceeding to take lands for public use, is a suit at common law within the language of the Judiciary Act of 1789, and where Congress has not prescribed any other tribunal, the Circuit Court has jurisdiction.

IN error to the Circuit Court of the United States for the Southern District of Ohio.

The opinion of the court was delivered by

STRONG, J.—It has not been seriously contended during the argument that the United States government is without power to appro-

priate lands or other property within the states for its own uses and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the states. These are needed for forts, armories and arsenals, for navy-yards and light-houses, for custom-houses, post-offices and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a state prohibiting a sale to the federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a state, or even upon that of a private citizen. This cannot be. No one doubts the existence in the state governments of the right of eminent domain; a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity, and it is inseparable from sovereignty, unless denied to it by its fundamental law: Vattel, ch. 20, 34; Bynkershoek, lib. 2, c. 15; Kent's Com. 338–40; Cooley on Const. Lim. 584, *et seq.* But it is no more necessary for the exercise of the powers of a state government than it is for the exercise of the conceded powers of the federal government. That government is as sovereign within its sphere as the states are within theirs. True, its sphere is limited. Certain subjects only are committed to it, but its power over those subjects is as full and complete as is the power of the states over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

But if the right of eminent domain exists in the federal government, it is a right which may be exercised within the states, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In *Ableman* v. *Booth*, 21 How. 523, Chief

Justice TANEY described in plain language the complex nature of our government and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post-offices and to create courts within the states was conferred upon the federal government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion that on making just compensation it may be taken? In Cooley on Constitutional Limitations, p. 526, it is said: "So far as the general government may deem it important to appropriate lands or other property for its own purposes, and to enable it to perform its functions, as must sometimes be necessary in the case of forts, light-houses, and military posts or roads, and other conveniences and necessities of government, the general government may exercise the authority as well within the states as within the territory under its exclusive jurisdiction, and its right to do so may be supported by the same reasons which support the right in any case; that is to say, the absolute necessity that the means in the government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties or of any other authority." We refer, also, to *Trombley* v. *Humphrey*, 23 Michigan 471; 10 Peters 723; *Dickey* v. *Turnpike Co.*, 7 Dana 113; *McCullough* v. *Maryland*, 4 Wheat. 429.

It is true, this power of the federal government has not heretofore been exercised adversely, but the non-user of a power does

not disprove its existence. In some instances the states, by virtue of their own right of eminent domain, have condemned lands for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the states. Such was the ruling in *Gilmer* v. *Lime Point*, 18 Cal. 229, where lands were condemned by a proceeding in a state court and under a state law for an United States fortification. A similar decision was made in *Burt* v. *The Merchants' Insurance Co.*, 106 Mass. 356, where land was taken under a state law as a site for a post-office and sub-treasury building. Neither of these cases denies the right of the federal government to have lands in the states condemned for its uses under its own power and by its own action. The question was whether the state could take lands for any other public use than that of the state. In *Trombley* v. *Humphrey*, 23 Mich. 471, a different doctrine was asserted, founded, we think, upon better reason. The proper view of the right of eminent domain seems to be that it is a right belonging to a sovereignty to take private property for its own public use and not for the use of another. Beyond that, there exists no necessity, which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a state. Nor can any state prescribe the manner in which it must be exercised. The consent of a state can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.

It may, therefore, fairly be concluded that the proceeding in the case we have in hand was a proceeding by the United States government in its own right and by virtue of its own eminent domain. The Act of Congress of March 2d 1872 (17 Stats. at Large 39), gave authority to the secretary of the treasury to purchase a central and suitable site in the city of Cincinnati, Ohio, for the erection of a building for the accommodation of the United States courts, custom-house, United States depository, post-office, internal revenue and pension offices, at a cost not exceeding $300,000, and a proviso to the act declared that no money should be expended in the purchase until the state of Ohio should cede its jurisdiction over the site and relinquish to the United States the right to tax the property. The authority here given was to

purchase. If that were all, it might be doubted whether the right of eminent domain was intended to be invoked. It is true, the words "to purchase" might be construed as including the power to acquire by condemnation, for, technically, purchase includes all modes of acquisition other than that of descent. But generally in statutes as in common use, the word is employed in a sense not technical, only as meaning acquisition by contract between the parties, without governmental interference. That Congress intended more than this is evident, however, in view of the subsequent and amendatory act passed June 10th 1872, which made an appropriation "for the purchase at private sale or by condemnation of the ground for a site" for the building. These provisions, connected as they are, manifest a clear intention to confer upon the secretary of the treasury power to acquire the grounds needed by the exercise of the national right of eminent domain, or by private purchase, at his discretion. Why speak of condemnation at all if Congress had not in view an exercise of the right of eminent domain and did not intend to confer upon the secretary the right to invoke it?

But it is contended on behalf of the plaintiffs in error, that the Circuit Court had no jurisdiction of the proceeding. There is nothing in the Acts of 1872, it is true, that directs the process by which the contemplated condemnation should be effected, or which expressly authorizes a proceeding in the Circuit Court to secure it. Doubtless Congress might have provided a mode of taking the land, and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what tribunal, or by what agents the taking and the ascertainment of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred expressly to the Circuit Court; but this we think was not necessary. The investment of the secretary of the treasury with power to obtain the land by condemnation, without prescribing the mode of exercising the power, gave him also the power to obtain it by any means that were competent to adjudge a condemnation. The Judiciary Act of 1789 conferred upon the Circuit Courts of the United States jurisdiction of all suits at common law, or in equity, when the United States, or any officer thereof, suing under the authority of any Act of Congress, are plaintiffs. If, then, a proceeding to take land for public uses by condemnation may be a

suit at common law, jurisdiction of it is vested in the Circuit Court. That it is a "suit" admits of no question. In *Weston* v. *Charleston*, 2 Pet. 464, Chief Justice MARSHALL, speaking for this court, said, "the term (suit) is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy which the law affords. The modes of proceeding may be various, but if a right is litigated in a court of justice, the proceeding by which the decision of the court is sought, is a suit." A writ of prohibition has, therefore, been held to be a suit; so has a writ of right, of which the Circuit Court has jurisdiction (*Green* v. *Liter*, 8 Cranch 229); so has *habeas corpus* (*Holmes* v. *Jamison*, 14 Pet. 564). When in the 11th sect. of the Judiciary Act of 1789, jurisdiction was given to the circuit courts of suits of a civil nature at common law, or in equity, it was intended to embrace not merely suits which the common law recognised as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, as distinguished from rights in equity, as well as suits in admiralty. The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute, but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial, for many civil, as well as criminal, proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land, in virtue of the government's eminent domain, and determining the compensation to be made for it is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right. It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature at least quasi-judicial. Certainly no other mode than a judicial trial has been provided.

It is argued that the assessment of property for the purpose of taking it, is in its nature like the assessment of its value for the purpose of taxation. It is said they are both valuations of the property to be made as the legislature may prescribe, to enable the government, in the one case, to take the whole of it, and in the other to take a part of it for public uses, and it is argued that no one but Congress could prescribe in either case, that the valu-

ation should be made in a judicial tribunal, or in a judicial proceeding, although it is admitted the legislature might authorize the valuation to be thus made in either case. If the supposed analogy be admitted it proves nothing. Assessments for taxation are specially provided for, and a mode is prescribed. No other is, therefore, admissible. But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law, and hence, as the government is a suitor for the property, under a claim of legal right to take it, there appears to be no reason for holding that the proper circuit court has not jurisdiction of the suit, under the general grant of jurisdiction made by the Act of 1789.

The second assignment of error is that the Circuit Court refused the demand of the defendants below, now plaintiffs in error, for a separate trial of the value of their estate in the property. They were lessees of one of the parcels sought to be taken, and they demanded a separate trial of the value of their interest, but the court overruled their demand and required that the jury should appraise the value of the lot or parcel, and that the lessees should in the same trial try the value of their leasehold estate therein. In directing the course of the trial the court required the lessor and the lessees each separately to state the nature of their estates to the jury, the lessor to offer his testimony separately, and the lessees theirs, and then the government to answer the testimony of the lessor and the lessees, and the court instructed the jury to find and return separately the value of the estates of the lessor and the lessees. It is of this the lessees complain. They contend that whether the proceeding is to be treated as founded on the national right of eminent domain, or on that of the state (its consent having been given by the enactment of the state legislature of February 15th 1873, 70 Ohio Laws 36, sect. 1), it was required to conform to the practice and proceedings in the courts of the state in like cases. This requirement, it is said, was made by the Act of Congress of June 1st 1872 (17 Stats. at L. 522). But admitting that the court was bound to conform to the practice and proceedings in the state courts in like cases, we do not perceive that any error was committed. Under the laws of Ohio it was regular to institute a joint proceeding against all the owners of lots proposed to be taken (*Giesy* v. *C. W. & T. Railroad Co.*, 4 Ohio St. 308), but the 8th section of the state statute gave to "the owner or owners

of each separate parcel" the right to a separate trial. In such a case, therefore, a separate trial is the mode of proceeding in the state courts. The statute treats all the owners of a parcel as one party, and gives to them collectively a trial separate from the trial of the issues between the government and the owners of other parcels. It hath this extent, no more. The court is not required to allow a separate trial to each owner of an estate or interest in each parcel, and no consideration of justice to those owners would be subserved by it. The Circuit Court, therefore, gave to the plaintiffs in error all, if not more than all, they had a right to ask.

The judgment of the Circuit Court is affirmed.

FIELD, J., dissenting.—Assuming that the majority of the court are correct in the doctrine announced in the opinion just read, that the right of eminent domain within the states, using those terms not as synonymous with the ultimate dominion or title to property, but as indicating merely the right to take private property for public uses, belongs to the federal government to enable it to execute the powers conferred by the Constitution; and that any other doctrine would subordinate, in important particulars, the national authority to the caprice of individuals or the will of state legislatures, it appears to me that provision for the exercise of the right must first be made by legislation. The federal courts have no inherent jurisdiction of a proceeding instituted for the condemnation of property, and I do not find any statute of Congress conferring upon them such authority. The Judiciary Act of 1789 only invests the circuit courts of the United States with jurisdiction, concurrent with that of the state courts, of suits of a civil nature at common law or in equity; and these terms have reference to those classes of cases which are conducted by regular pleadings between parties, according to the established doctrines prevailing at the time in the jurisprudence of England. The proceeding to ascertain the value of property which the government may deem necessary to the execution of its powers, and thus the compensation to be made for its appropriation, is not a suit at common law or in equity, but an inquisition for the ascertainment of a particular fact as preliminary to the taking, and all that is required is that the proceeding shall be conducted in some fair and just mode, to be provided by law, either with or without the intervention of a jury, opportunity being afforded to parties interested to present evidence as to the value of the property and

to be heard thereon. The proceeding by the states in the exercise of their right of eminent domain, is often had before commissioners of assessment or special boards appointed for that purpose. It can hardly be doubted that Congress might provide for inquisition as to the value of property to be taken by similar instrumentalities, and yet if the proceeding be a suit at common law, the intervention of a jury would be required by the seventh amendment to the Constitution.

I think that the decision of the majority of the court in including the proceeding in this case under the general designation of a suit at common law, with which the circuit courts of the United States are invested by the eleventh section of the Judiciary Act, goes beyond previous adjudications and is in conflict with them.

Nor am I able to agree with the majority in their opinion, or at least intimation, that the authority to purchase carries with it authority to acquire by condemnation. The one supposes an agreement upon valuation and a voluntary conveyance of the property; the other implies a compulsory taking and a contestation as to the value: *Beekman* v. *The Saratoga & Schenectady Railroad Co.*, 3 Paige 75; *Railroad Co.* v. *Davis*, 2 Dev. & Batt. 465; *Willyard* v. *Hamilton*, 7 Ham. (O.) 453; *Livingston* v. *The Mayor of New York*, 7 Wend. 85; *Koppikus* v. *State Capitol Commissioners*, 16 Cal. 249.

For these reasons I am compelled to dissent from the opinion of the court.

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*United States District Court, Western District of Tennessee.*

## EX PARTE WADDY THOMPSON.[1]

The United States courts have power under the writ of *habeas corpus* to discharge persons from the custody of state officers, where it appears that they are held under a state law which seeks to punish them for executing a law of the United States, or where the act for which they are held was done in pursuance of the process of a Federal court.

But where a party is in custody of a state officer under an indictment for larceny and sets up as a justification for the act complained of a writ of replevin issued from a United States court, the latter court will on *habeas corpus* inquire into the fact whether its writ was fraudulently obtained for the purpose of carrying off

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[1] We are indebted for this case to L. B. McFarland, Esq., of counsel for respondent.—Ed. Am. Law Reg.